

requiring constant contact under all conditions or allowing any minimum level of contact to satisfy the standard. The standard involved in Old Ben, 30 C.F.R. § 77.1700, provides that no employee shall be required to "work alone in any area where hazardous conditions exist that would endanger his safety unless he can communicate with others, can be heard, or can be seen." The Commission held that this standard requires:

communication or contact of a regular and dependable nature commensurate with the risk present in a particular situation. As the hazard increases, the required level of communication or contact increases.

4 FMSHRC at 1803. 5/

Thus, the precise issue presented is whether the contact Lopez had with the other Cotter employees was (1) of a regular and dependable nature, and (2) commensurate with the hazard presented. The judge answered the first question in the affirmative and we agree. 7 FMSHRC at 367. Herrera, who had been assigned by the shift boss, Redmond, to assist Lopez, was aware that he was to check on Lopez on a periodic basis. He did check on Lopez around 9:00 a.m., staying with him approximately 15 minutes. He also attempted to check on Lopez a second time shortly after 10:00 a.m.; however, the citation had already been issued. In between these two visits, Redmond also checked on Lopez, staying with him for approximately 15 minutes. Under these circumstances, we affirm the judge's finding that the presence of Herrera and Redmond "was in general accord with a plan to provide periodic contact with Lopez on a regularized basis." 7 FMSHRC at 367.

The actual amount of time that other miners spent with Lopez is particularly compelling. The judge found, and the evidence shows, that Lopez was in contact with other miners for a total of approximately 30 of the 80 minutes before being observed by the Inspector. 7 FMSHRC at 366-67. This is nearly 40% of the time during which he was engaged in drilling-related activities in stope 17-3. Moreover, the actual drilling consumed only about 30 minutes of the 8:40-10:00 a.m. time period involved. Also during this period Varela twice walked down towards the entrance to stope 17-3 to check on Lopez. From the sound of the drill, Varela could hear that the drilling was proceeding normally. We conclude that, as a matter of law, such a substantial level of contact is sufficient to satisfy the requirements of the standard during the drilling operation at issue. Lopez was an experienced

5/ Section 57.18-25 refers to being heard or seen but, unlike section 77.1700, does not refer to "communication" with others. Like the judge (7 FMSHRC at 365-66), we do not view this difference in wording as important in this specific case, although we recognize that different issues may arise under each standard. We use the term "contact" here as a convenient summary term for being heard or seen apart from any notions of interactive "communication."